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2001

## Foreword: Is Reliance Still Dead?

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38 San Diego L. Rev. 1-12 (2001)

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# Foreword: Is Reliance Still Dead?

RANDY E. BARNETT\*

*This just in: Generalissimo Francisco Franco is still dead.*

Chevy Chase, *Saturday Night Live*, circa 1975

One thing I found out when I was a prosecutor is that you should never tell a police officer he cannot do something, for that just serves as an open invitation for him to do it. In recent years, I have learned a similar lesson about legal scholarship which I should probably keep to myself but won't. If you proclaim the existence of a scholarly "consensus," this is an open invitation for academics to try to demolish such a claim.

In 1996, I published an article entitled *The Death of Reliance*,<sup>1</sup> based on a talk I gave at the annual meeting of the Association of American Law Schools on recent trends in legal scholarship. In it I claimed there then existed a "new consensus" that a "reliance theory" did not explain the doctrine of promissory estoppel.<sup>2</sup> What exactly a "reliance theory" is has never been made clear by those who seemed to advocate it—apart from their insistence that, just as tort law rectified the harm caused by physical misconduct, the purpose of contract law was to rectify

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1. Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996).

2. That same year, I identified another "new consensus" in an article that has provoked a similar adverse reaction. See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

detrimental reliance caused by verbal misconduct.<sup>3</sup>

This claim entails that reliance must exist before there should be any recovery (thereby calling into question the propriety of enforcing executory agreements), and that the normal measure of damages should be the “reliance interest” (thereby calling into question the propriety of awarding the “expectation interest”). Moreover, if the heart of this cause of action was induced detrimental reliance, then whether or not the promisor intended to be legally bound by her promise, or manifested such an intent to the promisee, and whether or not the promisee reasonably believed the promise to be legally binding were wholly immaterial. All this was much debated by contracts scholars in the 1960s and 1970s.

The “death of reliance” of which I wrote was based on the fact that, by the 1980s and 1990s, most contracts scholars who had written in any depth on the subject had concluded on the basis of comprehensive case analyses that: (a) the existence of detrimental reliance was not *sufficient* to explain when a promissory estoppel action would succeed and (b) the existence of detrimental reliance was not *necessary* for an action based on promissory estoppel to succeed.<sup>4</sup>

As to the first claim it was shown that a claimant needed “reliance plus something” to prevail in a promissory estoppel action and, therefore, a “reliance theory” of promissory estoppel could not, standing alone, explain what this “something” might be. As to the second claim, some scholars found that courts were enforcing serious, but nonbargained-for, promises in a business context even in the absence of any provable detrimental reliance. In addition I noted that some scholars, though not yet a consensus, had begun questioning whether the “reliance interest” should ever be a proper measure of contract damages, even as a fallback recovery when the expectation interest cannot, for some reason, be computed with adequate certainty.<sup>5</sup>

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3. See Barnett, *supra* note 1, at 518–22 (describing “the rise and fall of reliance”). See also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 274–77 (1986) (discussing reliance theories and their weaknesses).

4. See Barnett, *supra* note 1, at 522–27 (describing “the new consensus”). There I discussed or cited the following works: Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 (1985); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

5. In my article, I cited Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755. Since I wrote, Kelly has been joined in this general opinion by David W. Barnes, *The Net Expectation Interest in Contract*

All this led me to conclude that, as a theory of promissory estoppel, reliance was dead. I did not claim, I hasten to add, that *promissory estoppel* was dead or dying.<sup>6</sup> This was never even suggested by the scholarship I was reporting, nor have I ever contended that reliance was unimportant as a goal of contractual enforcement. To the contrary, I distinguished between “the tort-like conception of contract in which the *inducement of detrimental reliance* may be held to justify a remedy to compensate for the detriment incurred”<sup>7</sup> from the quite different concern that “contracts are viewed as protecting one party’s *right* to rely on the commitment of another.”<sup>8</sup> That the protection and facilitation of reliance was an important function of contract law was never at issue in this debate. Rather, the “new consensus” scholars denied the claim made during the 1960s and 1970s that a reliance principle could explain the doctrine of promissory estoppel and even supplant altogether the traditional requirement of bargained-for consideration.

The reaction to this thesis was pretty swift as scholarly reactions go, and far surpassed the reaction to the underlying scholarship I had been summarizing and reporting. (Lesson number 2: asserting the existence of a scholarly “consensus” is an excellent way to get yourself cited if it ticks off enough people.) Most notably challenged was claim (b): that the existence of reliance was no longer a necessary element of promissory estoppel. This was effectively refuted by a study of

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*Damages*, 48 EMORY L.J. 1137 (1999). Both authors are contributors to this Symposium, in which the challenges they have made to the “reliance interest of contract damages” are both expanded and critically evaluated.

6. Professor Charles Knapp has apparently misinterpreted my claim in precisely this way. See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1244 (1998) (referring to “Professor Barnett’s death notice for promissory estoppel”); *id.* at 1245 (referring to “earlier writers [who] have surveyed the case law and reported that promissory estoppel is dead” and citing to *The Death of Reliance*). Eric Mills Holmes, on whom Professor Knapp then relies to refute this alleged claim, understood that this was not the thesis of my earlier work with Mary Becker, *supra* note 4, on promissory estoppel. See Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 46 n.5 (1996). Holmes misinterprets our article in a different way, however. We were not “courteously allow[ing] the doctrine to rest in the shadowlands of tort and contract.” *Id.* at 46. Rather, we tried to remove promissory estoppel from the shadowlands by categorizing a large part of the doctrine as lying squarely within contract law, and a smaller part lying squarely within tort. In contrast, in his important article (that appeared around the same time as *The Death of Reliance*), Holmes contends that “promissory estoppel is promissory estoppel,” an equitable form of relief that sits on its own bottom. *Id.* at 48.

7. Barnett, *supra* note 1, at 522.

8. *Id.*

promissory estoppel cases by Robert Hillman in which he found that the absence of reliance was dispositive in 25% of the cases in which promissory estoppel claims were denied.<sup>9</sup> These data certainly support the conclusion that a reliance requirement for recovery in promissory estoppel does indeed exist and, in this regard at least, reliance is not dead.

But Hillman's study also suggested that the existence of a promise was as necessary as detrimental reliance to a promissory estoppel action. In 135 cases (50%) a defect in the promise was discussed while in 52 of these cases (19% of the total cases surveyed) reliance was not discussed.<sup>10</sup> As Hillman notes: "The result here should not be surprising if *both* promise and reliance are prerequisites for recovery on promissory estoppel grounds."<sup>11</sup> In one sense, this seems unremarkable. Section 90 of the *Restatement (Second) of Contracts* always said that a promise was needed for promissory estoppel. Indeed, section 90 does not use the term "promissory estoppel" at all, speaking instead of "Promise Reasonably Inducing Action or Forbearance."<sup>12</sup> For that matter, though it explicitly refers to "a promise," the *Restatement* does not actually use the term "reliance"—instead referring to promises that "induce action or forbearance on the part of the promisee."<sup>13</sup>

But though it should have come as no surprise that the existence of a promise was still a requirement of promissory estoppel, this finding still undercut the old 1960s and 1970s "reliance theory" of promissory estoppel in which reliance on any verbal conduct was to be treated like a form of a verbal tort. According to this approach, *Hoffman v. Red Owl Stores, Inc.*<sup>14</sup> was the harbinger of bigger things to come. The court in *Red Owl* had dispensed with the requirement that it actually enforce a promise of a franchise made by the defendant. In the much heralded words of the *Red Owl* court in response to the objection that the "promise" was not definite enough to merit ordinary *contractual* enforcement: "We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action."<sup>15</sup>

This was taken to signal that promissory estoppel was not the "substitute for consideration" that Samuel Williston explicitly, and the

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9. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 600 (1998).

10. *Id.* at 599 n.87.

11. *Id.* at 601.

12. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

13. *Id.*

14. 133 N.W.2d 267 (Wis. 1965).

15. *Id.* at 275.

*Restatements* implicitly, conceived it to be.<sup>16</sup> That is, it was not merely a substitute for a nonexistent bargain in finding enforceability of a promise that otherwise met all the normal requirements of a contract. Rather, it was a different beast altogether and one that, if properly fed and nurtured, could grow to supplant the bargain theory of consideration entirely. In place of a requirement of reciprocal inducement, by which we establish enforceability and all the other formal requirements by which we assess the existence of assent, would be an omnibus cause of action based upon injuries caused by reliance on the verbal conduct of others, in the same way that tort law compensates for injuries caused by the physical conduct of others. Contracts would not themselves die away, but contract law with its basic principle that contractual duties were the creation of consenting parties would be supplanted by tort law that imposes duties on people whether or not they consent.

Extolling very rare judicial statements in such cases as *Red Owl*, progressive contracts scholars lobbied for what Grant Gilmore colorfully called the “Death of Contract.”<sup>17</sup> And it was this campaign of the 1960s and 1970s that provoked the “new consensus” scholarship debunking the role of reliance. Significantly, as was just seen in the data presented by Professor Hillman, the recent reaction to this “new consensus” scholarship has not undermined the importance of promise.<sup>18</sup> To the contrary, it has reinforced it. Nor has it undermined the claim that the existence of detrimental reliance alone is not sufficient to support an action of promissory estoppel. For one thing, a promise is also required, but more than that may also be necessary.

In an important article published almost simultaneously with Hillman’s, Sidney DeLong presented the results of his survey of a similarly massive number of promissory estoppel cases over substantially the same time period.<sup>19</sup> His study confirmed Hillman’s finding that detrimental reliance remained a necessary element of an action for promissory estoppel,<sup>20</sup> and to that extent at least the “new

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16. See S. WILLISTON, *THE LAW OF CONTRACTS* § 139, at 307 (1920) (section entitled “Estoppel As a Substitute for Consideration”).

17. Grant Gilmore, *THE DEATH OF CONTRACT* (1974).

18. See Hillman, *supra* note 9.

19. Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943.

20. See *id.* at 981 (“A legion of unhappy plaintiffs can bear witness to the continued vitality of the actual reliance requirement, having discovered that a commercial promise is not alone sufficient to ground a claim under Section 90.”).

consensus” scholars were wrong as a descriptive matter. But, unlike Hillman, DeLong also tried to discern the factor or factors that might be needed to turn detrimental reliance in the absence of a bargain into a successful cause of action.

According to DeLong, his data suggest the existence of two types of reliance which he called “performance reliance” and “enforcement reliance.”<sup>21</sup> Performance reliance refers to the trust that a promisee puts in the promisor to perform his promise. For many reasons, wholly apart from the perception of enforceability, the promisee believes that the promise will be performed. Enforcement reliance, by contrast, refers to reliance on a promise that a promisee reasonably believes to be made with the intention of being legally binding. DeLong suggests a norm may be developing that limits promissory estoppel recoveries to enforcement reliance.<sup>22</sup> If this is so, it means that to succeed in making a promissory estoppel claim you need “detrimental reliance plus something”—and that “something” is a manifested intention to be legally bound.<sup>23</sup>

All this, of course, is purely descriptive (and it is far from clear from his tone that DeLong approves of the judicial trend he reports). It does not answer the normative question of whether promissory estoppel actions *should* be limited to cases where detrimental reliance can be proved or should extend to *any* manifestation of intention to be legally bound whether bargained-for or not, and whether relied upon or not. I have suggested elsewhere that this would be a good thing: that contractual enforcement is justified, *prima facie*, whenever there has been a consent to be legally bound, whether explicit or implicit.<sup>24</sup>

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21. See *id.* at 953.

22. See *id.* at 1003.

Many of the opinions reported in 1995 and 1996 lend support to the thesis that, in order to prevail on a promissory estoppel claim, a commercial promisee must now demonstrate not only that her reliance was reasonable in light of the likelihood that the promisor would perform, but also that she had a reasonable belief that the promise was legally enforceable when made.

*Id.*

23. See *id.* at 994 (“[T]he 1995-96 case sample contains several decisions suggesting that a manifestation of consent to be legally bound may be becoming essential to liability under Section 90.”).

24. Barnett, *supra* note 3, at 319; Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421 (1993); Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL’Y 62 (1992); Randy Barnett, *The Internal and External Analysis of Concepts*, 11 CARDOZO L. REV. 525 (1990). The implications of this claim for contract law doctrine are developed in: Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL’Y 179 (1986); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL’Y 783 (1992); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*,

In sum, the existence of a manifested intention to be legally bound is what might, as a descriptive matter, and ought to, as a normative matter, separate the detrimental reliance that justifies legal relief from the detrimental reliance that does not. And no theorist has ever advocated compensating all and every form of detrimental reliance on the words and deeds of another. Instead, they have advocated basing recovery on reasonable, justified, or foreseeable reliance. But the next question immediately to be answered has always been: What exactly (or even approximately) constitutes the circumstances that make reliance reasonable, justified, or foreseeable so as to render the promise enforceable? It cannot be the presence of reliance since reliance is present in all such cases. In other words, a purely "reliance theory" cannot explain when detrimental reliance gives rise to a recovery and when it does not. Reliance theorists have been either silent or vague in their answers to this question.

In the interest of putting some doctrinal meat on these theoretical bones, both in my *Death of Reliance* article and in the first edition of my casebook, I formulated a series of hypothetical Restatement sections that might provide more guidance to courts than the current sections 71 and 90.<sup>25</sup> The first of these, section 71A, accepted as the starting point the proposal of Farber and Matheson that: "A promise is enforceable when made in furtherance of an economic activity."<sup>26</sup> Any promise made between commercial parties would be presumed enforceable unless there was some expressed or implied-in-fact disclaimer of liability. The second, section 71B, established the reverse default rule in cases of noncommercial promises. Such promises would be unenforceable unless supported by a formality manifesting an intention to be legally bound. In section 71C, I described circumstances in which the existence of substantial reliance would itself indicate to the promisee that a promisor intended her promise to be legally binding. And finally, in section 71D, I proposed that a promise meeting the requirements of sections 71A–C might still be unenforceable if the promisor could show that a reasonable promisee would not have understood the promisor to have intended the promise to be legally binding.

Upon further reflection, I have been persuaded that this scheme runs

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75 CAL. L. REV. 1969 (1987).

25. See Barnett, *supra* note 1, at 529–36; RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 906–15 (1st ed. 1995).

26. Barnett, *supra* note 1, at 539.



the risk of overenforcement.<sup>27</sup> The problem is its starting point: replacing the requirement of bargained-for consideration with the rebuttable presumption that any commercial promise should be enforced. I now think, and Sidney DeLong's study confirms that courts may think likewise, that too many promises not intended to be legally binding or reasonably taken as such by promisees would be enforced if this default rule were adopted. What is needed is not the overthrow of the bargain requirement but, like section 90 itself, a supplement to compensate for the underinclusiveness of section 71—though one that is more definite and theoretically clear than the extraordinarily open-ended section 90.

In the second edition of my casebook,<sup>28</sup> I replaced the fourfold alternative to both sections 71 and 90 with the following substitute only for section 90:

#### RESTATEMENT (THIRD) OF CONTRACTS

##### §90. ENFORCEABILITY OF NONBARGAIN PROMISES

In the absence of consideration as defined in §71, a promise is binding if

- (1) the promise is accompanied by a formality that manifests an intention to be legally bound, such as:
  - (a) a seal or
  - (b) the recital of a nominal consideration or
  - (c) an expression of intention to be legally bound, or
  - (d) copies of a writing sent to both the promisor and the promisee and bearing the signatures of both parties; or
- (2) with the knowledge of the promisor, the promise induces reliance by the promisee
  - (a) that is so substantial that it would be unlikely in the absence of a manifested intention by the promisor to be legally bound . . . and,
  - (b) the promisee expects the promise to be enforceable and is aware that the promisor has knowledge of the promisee's reliance, and
  - (c) the promisor remains silent concerning the promisee's reliance.<sup>29</sup>

The idea here is twofold. Allow enforcement based on bargained-for commitments (which typically manifest an intention to be legally bound) to be supplemented by those nonbargained-for commitments that, whether by formalities or substantial reliance, also manifest an intention to be legally bound. I do not contend that this will capture the whole of what promissory estoppel doctrine currently enforces. But it does capture the aspect of promissory estoppel that sounds in contract. Most notably, it excludes the proportionately small number of cases now

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27. See Christopher Wonnell, *Expectation, Reliance, and The Two Contractual Wrongs*, 38 SAN DIEGO L. REV. 53, 122–23 (2001).

28. RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* (2d ed. 1999).

29. *Id.* at 872.

handled by promissory estoppel that properly sound in *tort*. Mary Becker and I proposed an expansion of the tort of promissory misrepresentation to include not only lies-when-made, but also statements that recklessly or negligently misrepresent the reliability of the promise.<sup>30</sup> This was the theory that we contended best explained the recovery in *Red Owl*<sup>31</sup> just as we contended that *Goodman v. Dicker*<sup>32</sup> was also a negligent misrepresentation case, not a case of breach of contract.

Of course all this presupposes that it matters whether promissory estoppel sounds in contract or in tort. The virtue of making such a categorical distinction has long been questioned by legal realists. Recently, Charles Knapp has responded to *The Death of Reliance* and the “new consensus” articles on which it was based in a lengthy and complicated article running nearly 150 journal pages.<sup>33</sup> In a section entitled “Felix Unger Cleans House: Reliance Refurbished,”<sup>34</sup> he takes issue with my original fourfold doctrinal proposal. He also questions the merits of my effort with Mary Becker to distinguish the contractual from the tortious aspects of promissory estoppel doctrine, and my insistence that consent to be legally bound is what characterizes the contract side of the doctrinal divide. “Why this contract/tort line is such a sore spot with commentators like Barnett,” writes Knapp, “has never been clear to me.”<sup>35</sup>

Knapp concludes by disparaging the “first-year-of-law-school mentality [that] insists on compartmentalizing fraud with torts, even though anecdotal empirical evidence suggests that many torts teachers spend little or no time on it.”<sup>36</sup> Moreover, he says:

The insistence on doctrinal purity by Barnett and others smacks of nothing so

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30. Barnett & Becker, *supra* note 4, at 485–95.

31. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

32. 169 F.2d 684 (D.C. Cir. 1948).

33. Knapp, *supra* note 6. Professor Knapp’s extensive discussion of the role of reliance in contract merits a far more careful and lengthy analysis than I can give it here.

34. *Id.* at 1233–44.

35. *Id.* at 1243.

36. *Id.* at 1244. That first-year tort teachers spend little or no time on fraud is an argument for contracts professors to cover fraud at least briefly to contrast it with the defense of misrepresentation, as I do in my casebook. BARNETT, *supra* note 28, at 1071–79. It is not an argument for eliminating the doctrinal distinction between fraud and misrepresentation or between tort and contract. Similarly, my casebook includes a section on agency since it is so rarely covered by teachers of corporations. *See id.* at 572–96. This does not argue for collapsing the distinction between contract and agency.

much as the compulsive tidiness of a bunch of academic Felix Ungers, so intent on neat ordering that they ignore the uses to which the lawyering Oscar Madisons of the real world may put these doctrines. People make promises, people break promises, other people get hurt. Is this tort? Is this contract? As Karl Llewellyn once pungently remarked, "What the hell!"<sup>37</sup>

Professor Knapp does not really object to tidiness in drafting legal texts. For example, he suggests modest improvements to the precise language of my proposed Restatement sections. "At the very least (I know this sounds like nit-picking here—indulge me)," he writes, "a better-drafted subsection [71(a)] would have begun, like so many other sections of the Restatement and the U.C.C., with the cautionary phrase, 'Except as provided in this section . . . .'"<sup>38</sup> This concern for drafting tidiness is only natural, as Professor Knapp is a contracts lawyer, teacher, scholar, and the author of a wonderful contracts casebook. So my suggestion to improve the scope of section 90 cannot really be dismissed because it is tidy. Rather, Knapp must be concerned that it is tidy in an inappropriate way. His expressed concern—that I ignore the way lawyers in the world might use these doctrines—is inapt. The entire reason to tidy up the doctrine is to prevent lawyers (and judges) in the real world from abusing imprecise, ambiguous, or misguided language. The focus, then, is on whether we should preserve a realm of law for obligations voluntarily undertaken, because their very voluntariness creates a range of opportunities and benefits that cannot be obtained in the absence of consensual transactions.

One wonders: if the distinction between tort and contract were really so unimportant, why have academics been trying for decades to tear down the doctrinal wall between them? The answer is apparent. Contractual obligation has traditionally been thought to originate in the consent of the parties, and traditional contract doctrine reflects this. Tort obligations are imposed upon the parties by the law regardless of their consent. Hostility to the contract/tort distinction stems from a desire to abolish consent as the fount of contract and impose all obligations on parties. This hostility to consent was nowhere more clearly manifested than in the case of *In Re Baby "M"*<sup>39</sup> when the New Jersey Supreme Court held a surrogacy contract to be against public policy. Responding to the contention that the surrogate mother "agreed to the surrogacy agreement," the court wrote: "[W]e suggest that her consent is

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37. Knapp, *supra* note 6, at 1244 (citing KARL LLEWELLYN, PUT IN HIS THUMB 39–40 (1931)). I take no umbrage at the "Felix Unger" epithet. Professor Knapp tried to be witty in all his section headings. And the first time I read the article, for a brief moment I thought this section was going to be about *Roberto Unger*, not me.

38. *Id.* at 1239–40.

39. 537 A.2d 1227 (N.J. 1988).

irrelevant.”<sup>40</sup> Not lacking, not vitiated, not overridden by conflicting considerations, but *irrelevant*.

Rendering consent irrelevant to contract is the reason to tear down the wall between contract and tort. It is a concern for freedom of contract that motivates many of those who care about the contract/tort distinction, not some “doctrinal purity” or “compulsive tidiness.” And I suggest that the reverse is true as well. Those who are indifferent to the distinction between contract and tort are, at best, indifferent to the freedom of contract that this distinction tries to preserve. Neither of these arguments is random, but I have from the beginning made my normative basis explicit—leading Professor Knapp to refer to my “libertarian principles.”<sup>41</sup>

The problem for Knapp and other adherents to a general “reliance theory” of contract, which I say again has never been systematically articulated, is that the normal rules of contract law—both of contract formation and of defenses to enforcement—are themselves pretty “libertarian” or “classical liberal.” Thus, these rules need to be blurred and eroded if one is to accomplish “progressive” ends that violate libertarian or classical liberal means.

If DeLong is right, then despite its open-ended formulation, section 90 has done little damage to the principle of freedom of contract and, by counteracting the underenforcement of the bargain theory of consideration, has actually done some good. Nevertheless, I believe we can and should do better. It is dangerous to individual parties to leave the loaded gun of section 90 lying casually around for some judicial Oscar Madison to pick up and misuse. Whether it is my formulation or another, we should provide more guidance to courts about the true nature of promissory estoppel. And this is to protect the same freedom that contract law generally protects: the ability of parties to consent to binding obligations giving rise to a right of others to rely on those obligations.<sup>42</sup> If that is “ideological” then so is the drive to deny contract law of this vital function.

In the symposium that follows, some of the most thoughtful contracts scholars writing today present their takes on the third challenge to a

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40. *Id.* at 1249.

41. Knapp, *supra* note 6, at 1241.

42. For a general defense of freedom of contract see RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 53–57, 65–67, 101–02, 140–41, 154–55 (1998).

“reliance theory” of contract that I did not claim to be the subject of a consensus back in 1996: the import and coherence of the “reliance interest in contract damages.” Several of the participants—David Barnes, Sydney DeLong, and Michael Kelly, for example—have already participated in this ongoing scholarly debate on the proper role of reliance. Some are skeptical of the role of reliance; others are more supportive. Whether this new skepticism of the reliance interest in contract damages represents a “new consensus,” I will not say. For the time being, at least, I am out of the consensus-identifying business.

If this Symposium is any indication, reliance is still very much alive as a concern of contract theorists. It was ever thus. Nevertheless, most of what follows concerning the proper measure of damages for breaching an enforceable commitment is consistent with my basic thesis. While reliance remains a fundamental principle or end of contract law, as it always has been, it is consent to be legally bound that provides the essential means to the end of protecting the right to rely on the commitments of others and to other vital ends as well.